89-1773

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

LEANDRO RAMIREZ
Petitioner

VS.

THE UNITED STATES OF AMERICA
Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

KENT A. SCHAFFER
Counsel of Record
600 Travis, Suite 3000
Houston, TX 77002
(713)228-8500

QUESTION PRESENTED

Whether due process is offended when a conviction is based upon evidence which is not sufficient for a rational trier of fact to conclude that every element of the crime has been established beyond a reasonable doubt:

a) Where the accused is merely present in a place where illegal activities occur, and

b) Where the accused neither has knowledge of, nor participates in, the illegal activity.

LIST OF PARTIES
IN APPELLATE COURT

Leandro Ramirez

Appellants,

United States of America,

Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF CONTENTS OF THE
APPENDIX TO THE PETITION

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

LEANDRO RAMIREZ,
Petitioner

VS.

THE UNITED STATES OF AMERICA
Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

KENT A. SCHAFFER
Counsel of Record
600 Travis, Suite 3000
Houston, TX 77002
(713)228-8500

REFERENCE TO OPINIONS TO LOWER COURT

The opinion of the Fifth Circuit Court of Appeals and the order denying Rehearing, are reproduced in the appendix.

JURISDICTION

The Court of Appeals had appellate jurisdiction over the district court's final judgment in this criminal case, pursuant to 28 U.S.C. § 1291. The panel's order was entered on February 16, 1990. See A-5. The Petitioner's Petition for Panel Rehearing was timely filed on March 2, 1990. The Petition for Panel Rehearing was denied on March 22, 1990. See A-3. Consistent with this Honorable Court's Rule 13, this Petition is timely filed. This Court's jurisdiction in the instant case is based on 28 U.S.C. § 1254(1), and United States Supreme Court Rule 10.

CONSTITUTIONAL PROVISION AT ISSUE

The Due Process Clause of the Fifth Amendment to the United States Constitution states:

> "[N]or shall any person be deprived of . . . liberty. . . without due process of law."

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked pursuant to the indictment filed in the United States District Court for the Southern District of Texas, Laredo Division. References herein shall be made to the transcript record of the trial, by the designation "TR".

On April 5, 1988, the Petitioner was indicted, along with six other co-defendants, by a federal grand jury, charging him, in Count One, with conspiracy to distribute in excess of five kilograms of cocaine, in Count Two, with conspiracy to possess with intent to distribute in excess of five kilograms of cocaine, and in Counts Three and Four, with possession with intent to distribute cocaine.

At trial, two indicted co-conspirators, Felton Ream and Lelia Hunt, and an unindicted co-conspirator, Kenneth Nolan, agreed to testify for the Government. Neither of these three witnesses identified the Petitioner as a knowing participant in the conspiracy, while they did identify every other co-defendant as being a participant in the conspiracy. In fact, not one of these witnesses said a single word about the Petitioner.

The Government's case against the Petitioner was circumstantial. No conspirator identified him as a member of the conspiracy, implicitly or explicitly. There was no testimony as to any conversations between the Petitioner and other conspirators. No money was traced to the Petitioner. No drugs were found in

his actual possession. He was not shown to have known any of the other conspirators. Lastly, all defendants were from Hobbs, New Mexico, while the Petitioner lived in Zapata, Texas.

Although ultimately finding the evidence to be sufficient, the trial court candidly and expressly recognized that the sufficiency question was "tough [and] a much closer call for [Ramirez]." [TR. VI. - 516]. The trial court further stated:

> "The question of the overall sufficiency of the evidence is a closer one. Certainly this Petitioner's appeal would be stronger than that of any of the co-defendants. There was little direct evidence linking him to the conspiracy. The two cooperating co-defendants, Hunt and Ream, knew nothing of Ramirez... Ultimately the Petitioner's role in the offense must be determined by circumstantial evidence." [TR. IV. - 170].

The instant offense began on March 14, 1988, when defendants Hunt and Ream, and Petree left Hobbs for Zapata. Defendants Aranda and Flores were already there. They stayed in the Best Western Motel for about a week. The plan was to pick up 200 kilograms of cocaine in Zapata, but the endeavor was delayed. [TR. V.- 168-169]. On March 19, 1988, Aranda called Ream and Hunt at the motel, advised them that the van had been loaded, and instructed them to pick it up at the "big store" in Zapata. They drove to the store, where Hunt got in the van and drove it back to the motel to pick up Petree and depart for Kerrville, Texas. [TR. V.- 172]. They were followed by a truck containing Aranda, Ream, and Flores. [TR. V. - 173]. Three miles north of Zapata the police stopped both the van and the

truck and discovered a large quantity of cocaine in the van. [TR. V. - 219]. Aranda, Ream, Flores, Hunt, and Petree were arrested at this time, and Arguelles was arrested shortly thereafter, on the same day. Petitioner was not arrested on March 19, 1988. [TR. VI. - 467-468]. Hunt identified Aranda, Ream, Flores, and Petree as participants in the venture. She did not mention the Petitioner's name.

Like Hunt, Defendant Ream said not one word about the Petitioner. Unlike Hunt, however, he knew Pedro Arguelles, and implicated him in the venture. According to Ream, Arguelles came up a day or two after he had, and stayed in the Falcon Motel with Aranda and Flores. [TR. V. - 94]. Before the arrest, Arguelles left Zapata for Roma, Texas, promising to rejoin the group in Kerrville. [TR. V. -

97].

In addition to the direct testimony of Nolan, Hunt, and Ream, the Government called several peace officers to testify about surveillance that occurred in Zapata County between March 14 and 19, 1988. Officer Antonio Ricardo Gonzales observed a number of meetings at the two motels between co-defendants Aranda, Arguelles, Flores, Petree, Hunt, and Ream. [TR. V. - 242-246]. During four days of surveillance, he never observed the Petitioner. [TR. V.-262, 268]. Officer Alfonso G. De La Garza also observed numerous meetings between the co-defendants, but he too, did not observe the Petitioner. [TR. V. - 303-307;329].

At 4:15 p.m. on March 15, 1988, a beige Ford pickup truck drove up in front of room 121 at the Best Western Motel. It

stayed there four or five minutes, during which time the passenger exited and talked to Aranda and Flores. The passenger was never identified. The driver stayed in the truck. [TR. V. - 335,341-344]. The beige Ford truck was shown by vehicle registration information to belong to the Petitioner. [TR. V. - 379].

No witness testified that he actually observed the Petitioner inside the truck at the Best Western Motel on March 15, 1988. [TR. V. - 336]. Photographs of this meeting were introduced into evidence by the Government. Carlos Guerra was the Petitioner's cousin and a part of the surveillance team. Although he did not see the Petitioner during his surveillance duty, he did identify at trial a Government exhibit as a photograph showing "Leandro (Petitioner) in the truck". [TR.

V. - 402-450; VI. - 422]. Roberto Jose Loza, a trooper for the Department of Public Safety, had known the Petitioner for approximately 16 years. He did identify several Government exhibits as photographs of the Petitioner sitting in his truck. [TR. V. - 433,450,466]. These photographs depicted only a very limited amount of identifiable subject matter. As Mr. Loza explained, he could identify "the back of Leandro Ramirez, and . . . a little bit of side view". [TR. V. - 452].

Loza also testified that at 4:23 p.m. on March 15, 1988, he watched a brown and beige Ford pickup precede the van from the Best Western Motel to a ranch south of Zapata, which belonged to the Petitioner. [TR. VI. - 443-445]. This van stayed parked continuously at the ranch from March 15 until March 19, 1988. [TR. V. -

362]. Mr. Loza never stated that the brown and beige pickup which led the van to the property was the identical truck which belonged to the Petitioner. Eric Rigler, a pilot for the Federal Bureau of Investigation, who was flying at an altitude of 4,000 feet, could only say that the truck he observed was a beige and brown Ford pickup, and that it had the "same color characteristics" as the truck shown in the Government's exhibit, which belonged to the Petitioner. [TR. V. - 376].

Mr. Rigler also testified that, on March 19, 1988, he saw a brown and beige Ford pickup traveling from the barn to the boat dock area on the ranch, then back to the barn. People got out of the truck, worked with a boat, and carried packages from the boat and pickup to another

vehicle and the residence. These people could not be identified. Nor could Rigler say with certainty that this truck was the same truck he had seen on March 15, 1988, or that it was the truck known to belong to the Petitioner. It did, however, "appear [] to be the same truck". [TR. V. - 362-363,365].

Following the arrest of the other co-defendants, the police executed a warrant which authorized the search of a ranch house and barn on property belonging to Mr. Ramirez. [TR. V. - 279-280]. Inside the barn, underneath some buffalo grass seed, the police found some cocaine wrapped in yellow tape, with the word "gringui" written on each side. [TR. V. - 248-249;293]. Duffle bags marked "30 gringui", and a Colombian newspaper were also found in the barn. [TR. V. - 253].

A chemist from the Department of Public Safety testified that he could not determine whether the cocaine found in the barn came from the same "batch" as the 470 pounds which were seized from the van driven by Hunt. [TR. V. - 293-294,299]. One very poor latent print was lifted from the tape-wrapped cocaine found in the barn, but it could not be matched with anyone. [TR. V. - 281].

Although no witness positively identified the truck which was seen on the ranch on March 19, 1988, it was said to be similar in color to Petitioner's Ford. This, in turn, implied that Petitioner himself had been on the ranch on March 19, 1988, when the van was loaded with something, perhaps cocaine. To refute the implication that he had been on his ranch on March 19, 1988, with the smugglers, the

Petitioner called four witnesses who testified that he was elsewhere, helping to move a trailer house on that date from approximately 9:00 a.m. until 10:30 p.m. [TR. VI. - 541-543; 562-563; 573; 590-591]. It was also established that the Petitioner owned a blue truck, which he was in when he helped move the trailer. [TR. VI. - 545, 567, 580, 591-592].

The Government also implied that Petitioner had exclusive access to the ranch property by proving that access was limited by two locked gates. Petitioner proved that, even though there are locks on the gates to his property, the keys are hidden nearby, and a number of people in the area have the combination to the locks, and many people used the ranch without Petitioner's permission. [TR. VI. - 547, 554-555, 566, 581].

After both the Government and the Petitioner rested in their respective cases in chief, counsel for Petitioner moved for judgment of acquittal on Counts Two and Three, but said motion was denied. [TR. VI. - 528, 630]. A motion for judgment of acquittal was again made after verdict on July 18, 1988, and it was also overruled. [TR. III. - 119-120].

Following a jury trial, Petitioner was convicted of conspiracy to possess with intent to distribute cocaine and possession with intent to distribute cocaine, as charged in Counts Two and Three of the indictment, respectively. Petitioner was acquitted by the Court of Counts One and Four. He was sentenced to 168 months incarceration and fined $150,000.00. [TR. IV. - 15].

Appeal to the Fifth Circuit Court of Appeals followed.

REASONS FOR REVIEW

In holding that there was sufficient evidence for a rational trier of fact to find Petitioner guilty beyond a reasonable doubt of conspiracy to possess with intent to distribute cocaine and possession with the intent to distribute cocaine, the Fifth Circuit rendered a decision in conflict with the standard established by this Honorable Court. See U.S. Supreme Court Rule 10(.1)(c).

The Fifth Circuit's holding is also in conflict with other Fifth Circuit decisions, and other federal courts of appeals, on the issue of whether evidence that the Petitioner was merely present in a place where illegal activities occurred, is sufficient to convict him of conspiracy

to possess with intent to distribute and possession with intent to distribute a controlled substance. See U.S. Supreme Court Rule 10(.1)(a).

These reasons provide a compelling basis for this Court to grant the instant Petition for Writ of Certiorari.

ARGUMENT

I.

THE DECISION IS CONTRARY TO UNITED STATES SUPREME COURT STANDARD PROHIBITING CONVICTION EXCEPT UPON PROOF OF GUILT BEYOND A REASONABLE DOUBT

The Constitution of the United States prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt. Holland v. United States, 348 U.S. 121 (1954); In re Winship, 397 U.S. 358 (1970); See also Jackson v. Virginia, 443 U.S. 307 (1979). There must be sufficient evidence to

justify a rational trier of the facts to find guilt beyond a reasonable doubt. Glasser v. United States, 315 U.S. 60 (1942); Jackson v. Virginia, at 314-315.

Due process protects a defendant in a criminal case against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged". In re Winship at 364. Due process requires that the reasonable doubt standard be indispensable for it "impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue", and it operates to give "concrete substance" to the presumption of innocence to ensure against unjust convictions. Id. at 363, 364.

On review of the sufficiency of the evidence to support a criminal conviction,

the standard is whether, after viewing the evidence in the light most favorable to the prosecution, the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. See Glasser v. United States, supra.

This Court has held that there must be no hesitation to overturn a jury verdict when it is necessary to "guard against dilution of the principal that guilt is to be established by probative evidence and beyond a reasonable doubt". Estelle v. Williams, 425 U.S. 501, 503 (1976).

The record supports the fact that the district court did not apply this standard in denying Petitioner's Motion for Judgment of Acquittal, where the evidence was not sufficient for a rational trier of fact to find guilty beyond a reasonable

doubt. Likewise, the panel erred in finding the evidence sufficient to support the jury's verdict.

II.

THE DECISION IS CONTRARY TO FIFTH CIRCUIT DECISIONS WHICH HOLD THAT "MERE PRESENCE" WILL NOT WARRANT FINDING A PERSON GUILTY OF CONSPIRACY

The panel affirmed the district court when it held that despite finding the evidence not overwhelming, it was sufficient for a jury to find the Petitioner guilty of conspiracy beyond a reasonable doubt. It followed in finding that sufficient evidence existed to find Petitioner guilty of the substantive offense of possession under the Pinkerton doctrine. See Pinkerton v. United States, 328 U.S. 640 (1946).

In drug conspiracy cases, the Fifth Circuit requires the Government to prove

beyond a reasonable doubt that a conspiracy existed, that the accused knew of the conspiracy, and that he knowingly and voluntarily joined it. United States v. Espinoza-Seanez, 862 F.2d 526, 536 (5th Cir. 1988). In the present case, there certainly was a conspiracy to possess with intent to distribute cocaine, however, there was simply no evidence that Petitioner knew of this conspiracy, or that he intended to join it, or that he knowingly participated in it.

At the very most, the Government's proof here shows that Petitioner "associated with others who were involved with a conspiracy". United States v. Jackson, 700 F.2d 181 (5th Cir. 1983). The Fifth Circuit holds that "a showing that the defendant merely associated with those participating in a conspiracy is

insufficient". Id.; See also United States v. Fitzharris, 633 F.2d 416, 423 (5th Cir. 1980), cert. denied, 451 U.S. 988 (1981).

In United States v. Jackson, supra, th Court considered the sufficiency of the evidence in a conspiracy case. The Fifth Circuit found that a conspiracy did exist, and that the defendant was present while acts of the conspiracy took place at a restaurant meeting between two co-defendants.

> "Beyond that, the evidence shows no criminal conduct on Whitley's part beyond a reasonable doubt. Although testimony at trial showed that Whitley joined Jackson and Oliveira in the restaurant, there is no evidence indicating that Whitley knew the nature or purpose of the meeting, or even that a large amount of money was present. The government has offered no evidence indicating that Whitley was present during conversations in which the conspiracy was discussed. At the most, the evidence shows that Whitley

> associated with others who were involved with a conspiracy. That evidence is legally insufficient for a jury to infer, beyond a reasonable doubt, Whitley's knowing and voluntary participation in a conspiracy to possess cocaine with intent to distribute. His conviction may not rest on mere conjecture and suspicion. Id. at 185-86.

This case is remarkably similar to Jackson. As in Jackson, there was no proof from any source that the Petitioner was present when the conspiracy was discussed or even knew of the conspiracy. Mere association with conspirators, or placing the defendant in "a climate of activity that reeks of something foul," does not make the defendant a conspirator. Conjecture and suspicion is not enough. Id.

The decision by the panel reviewing this case is in direct conflict with the Fifth Circuit court's decision in Jackson.

The instant case is very similar to United States v. Gonzales, 703 F.2d 807 (5th Cir. 1983), where the court found the evidence insufficient to support the defendant's convictions of conspiracy to possess and possession with intent to distribute. There was no testimony that connected the defendant directly with the smuggling scheme, nor did any ever place him and the drug at the same place and time.

In Gonzales, at 808, the Fifth Circuit reversed the conviction of one deemed "probably guilty" because the chance he was innocent was "simply too high". Again, the decision of the panel reviewing this case is directly opposite to the Fifth Circuit's decision in Gonzales.

III.

OTHER COURTS OF APPEAL HOLD

THAT "MERE PRESENCE OR ASSOCIATION" IS NOT SUFFICIENT TO INFER KNOWLEDGE AND TO CONVICT A PERSON OF PARTICIPATING IN A CONSPIRACY

The Eleventh Circuit holds that mere presence is insufficient to establish knowing participation in a conspiracy, as is mere association with conspirators. See United States v. Sullivan, 763 F.2d 1215 (11th Cir. 1985).

In United States v. Sullivan, supra, the Court held that evidence amounting to little more than that the defendant was present at the hotel and parking lot and was seen walking and speaking with other defendants was totally insufficient to sustain a conviction of conspiracy to possess with intent to distribute in excess of 1,000 pounds of marijuana.

In the case at issue, Petitioner was merely seen sitting in a pickup truck at

a motel parking lot. He was not seen talking to any of the defendants. The panel's decision is in conflict with the Eleventh Circuit's decision in Sullivan.

In United States v. Soto, 716 F.2d 989 (2nd Cir. 1983), the Court held "[w]here the crime charged is conspiracy, a conviction cannot be sustained unless the Government establishes beyond a reasonable doubt that the defendant had the specific intent to violate the substantive statute[s]". And according to the Second Circuit, this cannot be established on the basis of association alone. Id. at 993.

The panel's decision is contrary to that of the Second Circuit in Soto in that Petitioner was linked to the conspiracy by his mere proximity to the criminal activity of others.

The First Circuit holds that for a conspiracy conviction, the accused must be aware of the purpose of the conspiracy and willingly participate with the intent to advance its purpose. United States v. Hyson, 721 F.2d 856 (1st Cir. 1983). In Hyson, the Court found that occupancy of an area by the accused with knowledge of drugs being stored there was not sufficient to find the accused guilty of conspiracy. The Court reasoned that mere association, even with knowledge that a crime is being committed, does not establish guilt of conspiracy. 721 F.2d at 862.

In United States v. Wexler, 838 F.2d 88 (3rd Cir. 1988), the Court found the evidence insufficient to sustain the defendant's conviction for conspiracy to distribute a controlled substance.

The Third Circuit reasoned that it "has been obliged to overturn conspiracy convictions because the defendant was not proven to have had knowledge of the illegal objective contemplated by the conspiracy ... and ... the inferences rising from keeping bad company are not enough to convict a defendant for conspiracy". Wexler at 91.

The Seventh Circuit also holds that nothing more than association with co-conspirators will not support a conviction for conspiracy. See United States v. Williams, 798 F.2d 1024 (7th Cir. 1986).

The consensus among the Courts of Appeal is that one's association with, and/or close proximity to persons actively involved with a conspiracy is not sufficient to prove beyond a reasonable doubt that the accused is a co-

conspirator.

The district court and the panel hearing this case have rendered decisions which are directly in conflict with the decisions of those Circuit Courts cited above.

CONCLUSION

For all of the foregoing reasons, the Petitioner respectfully submits that this Honorable Court should grant this Petition for Writ of Certiorari, reverse the judgment of the Fifth Circuit Court of Appeals and grant a judgment of acquittal based upon insufficient evidence.

Respectfully submitted,

KENT A. SCHAFFER
600 Travis, Suite 3000
Houston, Texas 77002
(713)228-8500

ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that the an original and forty (40) copies of the foregoing Petition for Writ of Certiorari and its Appendix were mailed by the undersigned to the United States Supreme Court on the 15th day of May, 1990. I also certify that true copies of the foregoing Petition of Writ of Certiorari were mailed to the following parties, via United States mail:

Carlos Martinez
Assistant U.S. Attorney
Southern District of Texas
1300 Matamoros
Room 200
Laredo, Texas 78044
[One copy]

Solicitor General
Dept. of Justice
10th St. &
Constitution Ave.
Washington, D.C.
20530
[Three copies]

Leandro Ramirez
[One copy]

KENT A. SCHAFFER

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

LEANDRO RAMIREZ
Petitioner

VS.

THE UNITED STATES OF AMERICA,
Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI

KENT A. SCHAFFER
Counsel of Record
600 Travis
Suite 3000
Houston, TX 77002
(713)228-8500

APPENDIX TABLE OF CONTENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-2970

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DOMINGO PANDO ARANDA,
PEDRO ARGUELLES, SR.,
MELINDA FRANKS PETREE and
GILBERTO LOPEZ FLORES,
LEANDRO RAMIREZ,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Texas

---

ON PETITION FOR REHEARING

(March 22, 1990)

Before GEE, REAVLEY and GARWOOD, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for

rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge
3-20-90

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 88-2970

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

PEDRO ARGUELLES, SR., DOMINGO PANDO ARANDA, MELINDA FRANKS PETREE, GILBERTO LOPEZ FLORES, AND LEANDRO RAMIREZ,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Texas

(CR-L-88-153)

(February 16, 1990)

Before GEE, REAVLEY, and GARWOOD Circuit Judges.

GEE, Circuit Judge: *

Today's appeal raises questions of the sufficiency of the evidence supporting appellants' convictions on various drug charges. Appellant Ramirez also challenges the district court's disposition of his Fourth Amendment claim stemming from a search of his barn, and appellants Petree, Flores and Arguelles complain of the district court's rejection of their claim that certain closing remarks of the prosecutor substantially prejudiced their rights. Finally, appellant Aranda challenges the legality of evidence garnered through a wiretap and contends that the district court erred in denying him an evidentiary hearing regarding the admissibility of the evidence thereby obtained. None of appellants' contentions have merit and we therefore affirm the judgment of the

district court.

Facts and Prior Proceedings

The defendants in this case, along with others, participated in a plan to load 213 kilograms of cocaine into a van at a ranch near Zapata, Texas, and transport it to New York City. The evidence demonstrated that appellants Aranda and Arguelles supervised the operation; appellant Flores assisted Aranda; appellants Ream, Hunt, and Petree acted as couriers; and appellant Ramirez owned the ranch where the loading of the cocaine occurred. After several days of waiting in Zapata, Texas, the appellants loaded 213 kilograms of uncut cocaine from boats docked at Ramirez's ranch into a van, registered in Hunt's name[1], and

[1] The van was purchased by Ream at the behest and expense of Aranda. It was originally registered in Ream's name.

containing a secret compartment.

Officers stopped the van about three miles north of Zapata. In the false bottom they found cocaine wrapped in yellow packages, some of which had the word "Gringui" written on the side. Pursuant to a warrant, authorities then searched the barn on Ramirez's ranch. Under some buffalo grass seed, they found a kilogram of cocaine wrapped in yellow plastic with the word "Gringui" written on the wrapping. In addition, agents discovered two duffel bags with "30 Gringui" on the side, two other bags with the marking "30 Iberia," a Colombian newspaper, and two boats.

Following a jury trial, the appellants were convicted of conspiracy to possess five kilograms or more of cocaine with intent to distribute, in violation of

21 U.S.C. Section 846 and possession of five kilograms or more of cocaine with intent to distribute, in violation of 21 U.S. C. Section 841(a)(1).

I. Sufficiency of the evidence

Appellants Petree, Arguelles, Flores, and Ramirez each contend that the evidence was insufficient to support his conviction of conspiracy and possession of cocaine with intent to distribute. Their contentions are without merit.

In reviewing sufficiency of the evidence, the question before the appellate court is whether there is substantial evidence, viewed in the light most favorable to the government, to uphold a jury's verdict of conviction. United States v. Kaufman, 858 F.2d 994, 999 (5th Cir. 1988). In a drug conspiracy case, the government must prove (1) that a

conspiracy existed, (2) that the defendant knew of the conspiracy, and (3) that he knowingly and voluntarily joined it. United States v. Cardenas Averado, 806 F.2d 566, 569 (5th Cir. 1986). The jury may infer an agreement from surrounding circumstances, such as a "concert of action" among defendants. United States v. Arzola-Amaya, 867 F.2d 1504, 1511 (5th Cir. 1989), cert. denied, 107 L.Ed. 312. Although mere presence and close association will not alone support an inference of membership in a conspiracy, the jury may rely on that presence and association along with other evidence to find knowing participation. United States v. Ascarrunz, 838 F.2d 759, 763 (5th Cir. 1988). Thus, "presence and association under an aggravated set of suspicious circumstances" may be sufficient to prove

membership in the conspiracy. United States v. Henry, 849 F.2d 1534, 1536 (5th Cir. 1988).

A. Petree

Appellant Melinda Petree was recruited by codefendants Hunt and Ream[2] to accompany them as they transported drugs. The purpose of having Petree along was to advance the image of the group as a family going on an outing, to avert the suspicion of law enforcement officials. The evidence established that Petree had accompanied Hunt and Ream on a previous trip in which marijuana was smuggled and paid $1,000 for doing so. At trial, Hunt expressly testified that Petree knew that the conspirators were carrying drugs and that "her function" was to help advance

---

[2] Hunt and Ream pleaded guilty and testified at trial for the government.

the family subterfuge. Hunt and Ream both testified that Petree had agreed to ride along for $1,000 in cash. This evidence suffices to support Petree's conspiracy conviction.

B. Arguelles

The evidence established that Aranda instructed Arguelles to receive four kilograms of cocaine from Ream in Kerrville and to take the four kilos and drop one off in Hobbs, New Mexico, for Aranda and Ream as part payment for their efforts in the operation; in response to this instruction, Arguelles stated that he would first travel to Roma and then meet with Ream in Kerrville. This is sufficient to demonstrate that Arguelles was a knowing participant in the conspiracy.

C. Flores

Flores's main contention is that, although the facts demonstrate his close association with the conspirators, there is no evidence demonstrating that he knew of the illegal activities. This contention lacks merit. The evidence produced at trial shows that Flores shared a motel room with Aranda and Arguelles in Zapata and stayed in the room for most of the week while Aranda and the others waited until the van was loaded. Flores then road with Aranda as a passenger in the truck that followed the van out of Zapata. Flores was present when the unidentified man said he would take Aranda to the loading site and when Aranda reported a delay in the loading. He was also present when Aranda, Arguelles and Ream discussed the plan to transport four kilograms of cocaine to Kerrville. Flores

said at one point that he "wish[ed] [Aranda] would get this stuff loaded so we can go." Additionally, Aranda and Flores were seen leaving their motel room several times "continuously look[ing] around all over the area," allowing the inference that Flores was helping Aranda survey the area for law enforcement authorities. Finally, Flores had accompanied Aranda, Ream, and Hunt on previous drug runs and was paid $3,000 for his participation. These facts demonstrate more than "mere presence"; rather, they show "presence and association under an aggravated set of suspicious circumstances" sufficient to establish knowledge and membership in the conspiracy. See United States v. Henry, 849 F.2d 1534, 1536 (5th Cir. 1988).

D. Ramirez

The question of the sufficiency of the evidence in the conviction of Ramirez, the owner of the ranch where the cocaine was loaded, is closer than with the other co-defendants. The wisdom of previous cases teaches us that "a jury is free to choose among reasonable constructions of evidence, and evidence of guilty need not exclude every reasonable possibility of innocence or be wholly inconsistent with every conclusion except that of guilt." United States v. Basey, 816 F.2d 980, 1001 (5th Cir. 1987) (quoting United States v. Bell, 678 F.2d 547, 549 (5th Cir. 1983)). With that injunction in mind, we have observed that among the circumstances probative of conspiracy is "presence in a situation where one could assume participants would not allow bystanders." United States v. Davis, 810 F.2d 474, 477

(5th Cir. 1987) (citing United States v. Cruz Valdez, 773 F.2d 1541, 1546 (11th Cir. 1985), cert. denied, 475 U.S. 1049 (1986). Further, "voluntary participation may be inferred from a collocation of circumstances." United States v. Arzola-Amaya, 867 F.2d 1504, 1511 (1989) (quoting United States v. Espinoza-Seanez, 862 F.2d 526 (5th Cir. 1988)).

The evidence in the case at bar establishes that Ramirez drove his brown pickup truck to the motel where an unidentified passenger got out and spoke with Aranda and Flores. The van then followed Ramirez's pickup to the ranch, where the van remained for four days. During that time, law enforcement officers saw what appeared to be the same brown van shuttling between the barn and the boat dock area. Officers also detected persons

transporting packages between a boat, the pickup, the van and the residence. Following the seizure of the cocaine from the van, a search of the barn on Ramirez's property revealed one kilogram of cocaine, wrapped similarly to the ones seized from the van, hidden underneath some grass seed.

Ramirez contends that "it is possible that [he] authorized the conspirators to store their van on his uninhabited property for a few days, without the knowledge that they were going to ferry cocaine across the river and load it into the van." The government answers this contention by pointing out that the evidence established that the conspirators originally planned to load the van the evening that Aranda drove it to Ramirez's ranch or the following morning. It would,

therefore, be easier for a jury to conclude that Ramirez knowingly let the others use his ranch to load cocaine, than to conclude that Ramirez unwittingly allowed the others to store a van on his property 45 minutes out of town for only one night when there was no reason for the van's not remaining at their motel. Although innocent explanations for Ramirez's involvement in the activities at issue are imaginable, "every reasonable possibility of innocence," need not be excluded to convict. United States v. Basey, 816 F.2d 980, 101 (5th Cir. 1987). Although the evidence is not overwhelming, it was sufficient for a jury to find guilt beyond a reasonable doubt. We, therefore, conclude that Ramirez's conviction must stand.

II. Possession with Intent to Distribute

The Pinkerton doctrine recognizes that "a party to a continuing conspiracy may be responsible for a substantive offense committed by a co-conspirator, even though that party does not participate in the substantive offense or have any knowledge of it." Basey, 816 F.2d at 997. (citing Pinkerton v. United States, 328 U.S. 640, 647 (1946)). The substantive offense need only be "committed in furtherance of the conspiracy and as part of it." Nye & Nissen, Inc. v. United States, 336 U.S. 613, 618 (1949). As the evidence was clearly sufficient to establish that Hunt possessed the cocaine with intent to distribute because she sought to deliver the van loaded with cocaine to New York City, Petree, Arguelles, Flores, and Ramirez, as members of the same

conspiracy, are equally guilty of possession with intent to distribute under the Pinkerton theory.

III. Search Warrant

Appellant Ramirez contends that the search of his barn violated the Fourth Amendment. He maintains that (a) the affidavit supporting the search warrant file dot set out probable cause that cocaine was in the barn, and (2) the FBI agent who drafted the affidavit omitted information in reckless disregard for the truth.

The search warrant was supported by the affidavit of FBI agent W. Howard McCook. The affidavit was based in large part upon information from a confidential informant. Ramirez contends that the affidavit was insufficient to establish probable cause to believe that the cocaine

was already in the barn. This contention lacks merit. The affidavit indicates that the conspirators had originally been dealing with 800 Kilograms of cocaine, and that 200 kilograms had already been transported to New York by Ream, that 600 Kilograms remained to be distributed, and that the van would be loaded near Zapata to accomplish this purpose. The affidavit further indicates that the remaining 600 Kilograms would be picked up in two separate loads of approximately 300 kilograms apiece. Agent McCook testified that he believed at the time the affidavit was drafted that the cocaine was already in the barn.

Elaborate specificity is not required of affidavits supporting search warrants. "[A]n affidavit for search warrant is to be interpreted in a common sense and

realistic manner." United States v. Maestas, 546 F.2d 1177, 1180 (5th Cir. 1977). Although the affidavit does not explicitly state that the cocaine was already in the barn, the affidavit does sufficiently demonstrate the belief of the affiant that the drug was already present.

Ramirez also contends that the failure of the affidavit to set out a basis for the informant's belief renders it deficient. The Supreme Court, in Illinois v. Gates, 462 U.S. 213 (1983), eliminated the requirement that both the informant's reliability and the basis of his knowledge be set forth in the affidavit. In Gates, the Court adopted the "totality of the circumstances" test for determining whether a search warrant is supported by probable cause. Under Gates:

"The task of the issuing

> magistrate is simply to make a practical common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . concluding' that probable cause existed." Id. at 239-40 (citations omitted).

The affidavit in the present case amply shows the informant's reliability be setting forth information received from him in the past which had proved remarkably accurate. In addition, the information given concerning the current transaction was sufficiently detailed and proved to be accurate based on law enforcement officers' observations also contained in the affidavit.

Ramirez further argues that internal

inconsistencies in the affidavit negate its tendency to show probable cause. Specifically, he points out that the informant claimed "that the van would be driven to a ranch approximately 15 miles south of Zapata where it would be put inside a barn to be loaded with cocaine." But, Ramirez continues, "[s]urveillance ... established that the van was in fact driven to a ranch 22 miles south of Zapata, where it was parked adjacent to a barn." Ramirez would thus have us required infallibility on the part of informants--something never before required by any court. Gates, 462 U.S. at 245 n.14. The informant's information contained in the affidavit was detailed and supported by law enforcement officer observations. It was more than sufficient to establish probable cause.

Ramirez also contends that McCook misstated or omitted facts from the affidavit. Ramirez reasons that because the officers believed the cocaine to be already in the barn when the van arrived on March 15, they should have known that this belief was inaccurate because the van had not yet been loaded when they sought the issuance of the warrant on March 17. As we have noted above, Agent McCook testified that he believed that the barn already contained the cocaine on March 15; he further testified that, although he did not know the reason for the delay in the loading of the van, the delay did not cause him to believe that the cocaine had not already arrived. Consequently, Ramirez's argument on this point must fail.

IV. The Government's Closing Argument

Petree, Flores, and Arguelles contend that certain statements made as part of the prosecutor's closing argument constituted reversible error. This Court has set out the standard against which a prosecutor's remarks must be judged as follows:

> A prosecutor's remarks to the jury constitutes reversible error only when they are both "inappropriate and harmful." A criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone. Instead, the appellants must show that the prosecutor's statement affected their substantial rights. In determining whether improper argument affects a defendant's substantial rights, the court should consider: (1) the magnitude of the prejudicial effect of the statements; (2) the efficacy of any cautionary instructions, and (3) the strength of the evidence of appellants' guilt. A conviction should not be set aside if the prosecutor's conduct did not in fact contribute to the guilty verdict and was, therefore, legally harmless.

United States v. Lowenberg, 853 F.2d 295, 301-02 (5th Cir. 1988), cert. denied, 109 S.Ct. 1170 (1989) (citation omitted). Under the above standard, none of the prosecutor's remarks was so harmful as to constitute reversible error.

A. Remarks concerning out-of-town lawyers

In his summation, Flores's defense attorney, in an attempt to impeach Ream's and Hunt's credibility, argued that if Ream had in fact received about $30,000 for his participation in the first transportation of cocaine to New York City, "why did he tell the court when he was arrested that he was an indigent, that he had no money to pay for his lawyer and [Ream and Hunt] both got court lawyers". The attorney concluded that the witnesses must have "lied to the court when they said they had no money to hi;re a lawyer"

and therefore "lied to [the jury] too". Arguelles's counsel, in his summation, also sought to impeach the credibility of Ream and Hunt, remarking, "I mean, Ream even gets to keep his dope money, he doesn't even have to give that up."

In apparent reaction to the comments above, the government responded:

> There is evidence here about people like Mr. Ream coming up and getting to keep their dope money. Do you think they're saving thirty thousand buck[s]? I mean, do you think they have thirty thousand bucks? Don't you think they'd be out hiring attorneys like some of these others when they know what's at stake here? They don't have thirty thousand dollars. They don't have money to hire fancy out-of-state lawyers. They get court appointed attorneys.

Although a prosecutor is "entitled to make a fair response in rebuttal," United States v. Lowenberg, 853 F.2d 295, 303 (5th Cir. 1988), cert. denied, 109 S.Ct.

1170 (1989), the comments here go beyond rebuttal and imply impropriety in the appellants' proper exercise of their Sixth Amendment right to counsel.[3] We have strongly condemned such comments and have noticed them on appeal even without prior objection. United States v. Milstead, 671 F.2d 950, 953 (5th Cir. 1982). As we stated in United States v. McDonald, 620 F.2d 559, 564 (5th Cir. 1980), "[c]omments that penalize a defendant for the exercise of his right to counsel and that also strike at the core of his defense cannot be considered harmless error."

In McDonald, we distinguished between comments which "strike at the jugular" of

---

[3] Although counsel for Arguelles and Aranda were the only out-of-town attorneys, the remarks appear to have been directed toward all of the defendants' counsel; the prejudicial effect on the jury was probably the same as to all of the defendants.

a defendant's story and those which deal "only tangentially" with it. In that case, the defendant sought to establish a "mere presence" defense based upon a search by the police, which turned up no evidence linking him to the alleged conspiracy. In rebuttal, the prosecutor insinuated that the defendant had hired counsel to assist him in destroying evidence before the execution of the search warrant. Concluding that the remarks struck at the core of McDonald's defense, we revered his conviction.

Appellant Arguelles contends, with little elaboration, that the prosecutor's remarks in the present case, concerning "fancy out-of-town lawyers," struck at the core of his "mere presence" defense. Although such remarks are obviously improper, the relate only tangentially to

his defense and are not, therefore, harmful per se.[4]

As we note above, the harm of an improper remark may be mitigated by appropriate cautionary instructions. Following a timely objection to the remarks at issue here, the court stated: "Yes, let's disregard that ladies and gentlemen. As far as the lawyers go, where they're from or whatever, that's not relevant at all to what we have to do here today." In its final charge to the jury, the court gave a much more detailed cautionary instruction.[5] These

---

[4] If the appellant had, for example, sought to establish his noninvolvement by maintaining that he had received no money from the past operations, the reference to his retained counsel would have struck closer to the core of his exculpatory story, possibly requiring reversals.

[5] The court stated:

I might comment that, sometimes,

in the heat of battle here, the lawyers will say things sometimes more from emotion than from a cold analysis of the evidence. But I would say to you to disregard any indication of trying to be sympathetic to anyone for any reason or prejudicial [sic]. I mean, that's not the point here. Particularly any comment about ... Well, there was comment on both sides as to who had court-appointed lawyers and who had hired lawyers. That has absolutely nothing to do with this here. Everyone is entitled to lawyer. If they can hire a lawyer fine, so be it, that's good, or whether they do it, or their family helps them or whatever, and if they can't, we'll provide lawyers. But there's really nothing of any consequence to that one way or the other.

Now, these defendants are not from Laredo and they're not, as far as the evidence indicates, except for one, not even apparently from Texas. So whether their lawyers are from Texas or not seems to me of no particular consequence at all, or even unusual, and certainly irrelevant to what we have to decide here today. The question is not where they're from or

instructions sufficed to render the prosecutor's comments harmless error.

B. "Four lousy, stinking kilograms of cocaine"

In his closing statement, Arguelles' attorney attached the government's version of the evidence, maintaining that it made little sense that the group would drive the van loaded with more than 200 kilograms of cocaine to Kerrville and dismantle the secret compartment in the van just so they could take out "four lousy, stinking kilos and give them to Mr. Arguelles." In rebuttal, the prosector stated:

> whether you like their lawyers or don't like their lawyers, or whether their lawyers were paid or not paid, or hired or court appointed or whatever. The question is, has the Government proved by the evidence, beyond a reasonable doubt, that they did what they're charged with, and that's all we're here to decide.

> [O]ne thing that kind of confused me about a statement made here by Mr. Arguelles' attorney about "four louse, stinking kilos ...." This is pure, high grade cocaine, ladies and gentlemen. "Lousy, stinking kilograms" was what was said to you this morning, "four lousy stinking kilos," and I submit to you that that four lousy, stinking kilograms of pure high grade cocaine, that's poison and deadly, that's getting spread in New York . . .

At this point defense counsel objected on the ground that there was not evidence to support the argument, which objection was overruled. The prosecutor then continued:

> Where it's going to end up, in the streets, sold at a hundred dollars a gram, ending up in the veins of the people of New York and wherever else they were taking it, ladies and gentlemen. That's were that lousy, stinking cocaine was going. Think about that.

These remarks were clearly an "invited response" in rebuttal to Arguelles's argument that four kilograms of cocaine

were of little significance; taken in context, the remarks were not unduly prejudicial. See United States v. Young, 470 U.S. 1, 11 (1985).

C. "Death and Grief"

Later in his closing remarks, the prosecutor stated:

> [Aranda] was pleased that the compartment worked. He's spreading this death and grief amongst the people in New York and elsewhere, ladies and gentlemen. That's what these people were doing. That's what that man was arranging.

Although the prosecutor may impress on the jury the seriousness of the offense charged, he may not intentionally inflame them. Lowenberg, 853 F.2d at 304. In view of the wide latitude given in closing arguments, the prosecutor's reference to cocaine as "death and grief" could be interpreted as an attempt to impress, rather than inflame, and does not

constitute reversible error under the circumstances.

V. Wiretap

Aranda sought to suppress the use of a federal wiretap that the FBI had placed on Aranda's telephone in New Mexico. The government, asserting that it did not need the evidence produced from the wiretap, told the court that it would not use any of the wiretap evidence. In reliance on this, the court suppressed the wiretap evidence. Aranda contended, however, that all evidence against him should be suppressed as fruits of the allegedly illegal wiretap. Aranda now contends that the court below violated his right to due process and to confront witnesses when it denied him an evidentiary hearing and seeks a remand to determine the legality of the wiretap and the admissibility of

all of the evidence obtained as a result of it.

The decision to grant an evidentiary hearing is within the sound discretion of the district court; such hearings are "not granted as a matter of course." United States v. Harrelson, 705 F.2d 733, 737 (5th Cir. 1983). Factual allegations set forth in the defendant's motion including any accompanying affidavits, must be "sufficiently definite, specific, detailed, and nonconjectural, to enable the court to conclude that a substantial claim is presented." Id. at 737 (quotation omitted). General or conclusory assertions, founded upon mere suspicion or conjecture, will not suffice. Id.

The court below allowed Aranda's attorney to submit an affidavit in support

of his motion for a suppression hearing. Aranda conceded in the affidavit that, before the wiretap, government agents knew that he was a major supplier of cocaine to street peddlers in several New Mexico towns and that Arguelles dealt in large quantities of cocaine. The most specific allegation made in the affidavit was that

> [a]s a result of the illegal wire taps the government learned that a conspiracy between the Aranda family and the Arguelles family did exist and that defendant Domingo Aranda was involved in the large scale importation of drugs from Mexico. The government continued to investigate that conspiracy after the illegal wire tap was removed. The continued investigation lead to the arrest and charges against all defendants in the case at bar.

Most of the evidence produced at trial was the result of information provided by an informant. The affidavit did not state how the informant's information was

related to the use of the wiretap. Aranda now contends, on appeal, that the informant, one of Aranda's close relatives, was not approached by the government until after it learned of Aranda's involvement with other drug importation conspiracies from the wiretap. Because this information was not contained in the affidavit, we cannot say that the court below erred in not considering it. As the affidavit fails to indicate with any specificity how the evidence used at rial was a result of the wiretap, the court below properly exercised its discretion in denying an evidentiary hearing.

For the reasons set forth above, the decision of the district court is

AFFIRMED.